IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
AT
JODHPUR

J U D G M E N T

Residents of village Magra-Punjala	Versus	The State of Rajasthan & others.

D.B.CIVIL WRIT PETITION NO. 3409/2005
under Article 226 of the Constitution of India.

Date of Judgment : JULY 20, 2006

P R E S E N T

HON'BLE THE CHIEF JUSTICE SHRI S.N.JHA
HON'BLE SHRI JUSTICE MOHAMMAD RAFIQ

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Shri M.D.Purohit, Senior Advocate assisted by
Shri Anand Purohit and Rakesh Kalla for the
petitioners.
Shri M.R.Singhvi for the respondents.

BY THE COURT : (Per Hon'ble the Chief Justice) (oral)

The dispute in this writ petition which has been filed as a public interest litigation relates to location of an excise shop at Magra-Punjala, Kirti Nagar, Jodhpur. The petition was filed on 1.6.2005 during currency of the licence for 2005-2006 and though the period has since expired we are told that fresh licence has been issued to the contractor, Sita Ram Kachhawaha,respondent no.5 herein, for shop at the same site.

The case of the petitioners is that the shop is situated within the prohibited distance prescribed under rule 75 (2) of the Rajasthan Excise Rules, 1956. It is said that there are four schools in close proximity besides a Hanuman temple, and therefore, the location is violative of rule 75 (2).

Rule 75 so far as relevant runs as under :

> "75. Location of shops.-(1) A licensee for the retail sale of Country Liquor, Foreign or Indian Made Foreign Liquor or hemp drugs shall have his shop only at a place approved by the District Excise Officer concerned.
>
> (2) A shop for the retail sale of Country Liquor or Foreign or Indian Made Foreign Liquor shall not be located within a distance of 200 meters of Collegiate Educational Institution, Senior Higher Secondary School, Hospital, Place of Worship or place of Public Entertainment, a Factory or a Labour or Harijan colony.
>
> (3) ....
>
> (4)The District Excise Officer, with sufficient reasons to be recorded in writing, shall have the powers to shift a shop from one place to another and no compensation shall be given to the licensee for such shifting of a shop.
>
> Provided that the Excise Commissioner may grant relaxation in the above conditions of location of a Liquor shop in exceptional circumstances after recording sufficient reasons in writing for doing so.
>
> (5) ....
>
> Explanation 1.- For the purpose of sub-rule (2) of Rule 75, the restrictions about the distance of a shop from a

"place of Worship in the cities having a population of more than one lac shall only be applicable in respect of those places of worship entered in the list maintained in the office of the district Excise Officer.

2. ....

3. Any shop situated near an Educational Institution other than a College or a Senior Higher Secondary School level Institution shall be opened only atleast one hour after the closing time of that Institution.

4. ...."

The names of the schools in question and their distances from the shop, according to the petitioner, are as under :

(i)	Shiv Public School	225 meters
(ii)	Satyam Public School	150 meters
(iii)	J.B.M.Secondary School	114 meters
(iv)	Varun Vidhya Niketan Secondary School	157 meters

Khima Ram, Assistant Excise Officer has filed affidavit wherein it has inter alia, been stated as under :

" I am directed by District Excise Officer to verify the distances of various schools as mentioned in Ex. 6. Accordingly I myself went on the spot and measured the distances of all the schools, which are as under :

(A) J.B.M. Secondary School is situated at a distance of 135 meters.
(B) Satyam Public School is situated at a distance of 150 meter.
(C) Shiv Public School is situated at a distance of 225

meter.

(D)Varun Vidya Niketan is situated at a distance of 230 meters from the shop in question.

Thus all the schools are located beyond the prescribed distances."

On a conjoint reading of the averments made in the writ petition and the affidavit of Khima Ram it would appear that there is no dispute about the distance as regards Shiv Public School and Satyam Public School. While Varun Vidya Niketan Secondary School, according to the petitioner, is located within 200 meters of the shop, according to the Department it is situated 230 meters away which is beyond the 200 meters limit fixed under rule 75(2). So far as J.B.M. Public School is concerned, even as per the Department it is situated 135 meters away which is within prohibited distance.

Shri M.R.Singhvi , learned counsel for the Department submitted that the restriction as to distance in the case of educational institutions is applicable in respect of only colleges and senior higher secondary schools. Whereas not only JBM Public School but all other schools are secondary schools and therefore the bar contained in section 75(2) is not attracted in considering the location of the shop in question with reference to aforementioned schools.

As regards the temple he referred to explanation 1 and submitted that while considering the site offered by the licensee

contractor, the Department is required to consider its location with regard to the places of worship mentioned in the list maintained in the district excise office. Reference was made to another affidavit affirmed by Khima Ram to the effect that in the list of temples provided by Devasthan department, the temple in question does not find place. In the affidavit the alleged temple has been described as a *Chabutara* measuring 2'4" x 2'4" on which the statue of Hanumanji has been kept. It is said that the structure cannot be treated as a place of worship within the meaning of rule 75(2) read with Explanation (1).

Shri M.D.Purohit, learned counsel for the petitioner submitted that Khima Ram was not competent to file affidavit on behalf of the department. According to the counsel in terms of sub-rule (1) of rule 75 the District Excise Officer is competent to approve the shop at a particular location, and therefore, the District Excise Officer alone was competent to file affidavit on behalf of the Department.

We do not find any substance in the submission. It is true that the power of approval of the location vests in the District Excise Officer but the Assistant Excise Officer is not a stranger. Section 3(7) of the Rajasthan Excise Act, 1950 defines 'Excise Officer' to mean any officer or person other than the Excise Commissioner

appointed under section 9 or invested with powers of an excise officer under the Act. Under sub-section (1A) of section 9 the State Government is empowered to appoint inferior excise officers and the Assistant Excise Officer cannot so appointed therefore can not be said to be incompetent to file affidavit on behalf of the Department. Moreover, he claims to have personally visited and measured the distance on the direction of the District Excise Officer.

It is relevant to mention that the issue raised in this writ petition had travelled earlier to this Court in S.B.Civil Writ Petition no. 2027/2005 at the instance of the licensee, respondent no.5. It appears that on public protest, the Collector, Jodhpur had asked the District Excise Officer to reconsider the location of the shop in question and on 1.4.2005 the District Excise Officer directed the contractor to propose another site. He challenged the said direction in this Court. By order dated 2.5.2005 the order of the District Excise Officer was set aside and he was directed to pass appropriate order after hearing the petitioner under clause 4.2 and 4.10 of the conditions of licence taking note of the entire facts of the case “in the light of the observations made above”. The respondent was thereafter heard and the site/location proposed by him was approved. This writ petition came to be filed thereafter on 1.6.2005.

Shri Purohit submitted that the petitioners were not impleaded

in the said writ petition and the order was passed behind their back. This submission is to be summarily rejected for the simple reason that the petitioners being "residents of village Magra-Punjala" are an indeterminate group of persons and it is not possible to add an indeterminate body as respondents. It was open to the petitioners to intervene in the proceedings and oppose the prayer.

In the above premises we do not think the location of the shop in question can be said to be violative of mandate of rule 75(2) of the Excise Rules. We may observe in this connection that the mandate contained in sub-rule (2) of rule 75 does not appear to be the last word on the point. In terms of proviso to sub-rule (4) the Excise Commissioner is competent to grant relaxation regarding condition of location of liquor shop, of course, in exceptional circumstances after recording sufficient reasons for the same. We may note that there has been mushroom growth of schools in recent times and they are to be found in almost every corner of the city. Unauthorised constructions at public places in the name of temples also is a new phenomenon. If rule 75(2) were to be literally applied it would be very difficult for the contractor and indeed for the Department too to find a suitable place where shop free from rigours of rule 75 (2) can be opened. The Rajasthan Excise Act was enacted in the year 1950 and the Rules

were framed in 1956. Much water has flown since then. It is to be kept in mind that the excise licences are granted primarily for earning revenue and it is therefore necessary that balance is struck between the need of revenue and feeling of the public while selecting the site for establishing an excise shop.

In the above premises we find no merit in the writ petition which is accordingly dismissed.

(MOHAMMAD RAFIQ),J. (S.N.JHA), C.J

mathur/